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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE, Plaintiff and Respondent, v. LUPE JAMES SANCHEZ, Defendant and Appellant.	C060817 (Super. Ct. No. CRF06-730)

After the first jury deadlocked and the trial court declared a mistrial, a second jury found defendant Lupe James Sanchez guilty of the continuous sexual abuse of his minor stepdaughter (the victim), a child under the age of 14 (Pen. Code, § 288.5, subd. (a)) and acquitted him of misdemeanor child molestation of a second alleged victim (*id.*, § 647.6). The court sentenced him to 16 years in state prison.

Defendant attacks the trial court's actions in two respects on appeal. He argues that it erred in excluding impeachment evidence of the victim's extrajudicial assault on her paternal aunt (a defense witness) between the two trials, and of the victim's arrest in 2005 for petty theft. He also contends that

the court erred in denying his motion for disclosure of juror identification data for the purpose of investigating juror misconduct, and his request for funds to conduct the investigation. We shall affirm the judgment.

FACTUAL BACKGROUND

Ultimately, we do not find any error requiring us to assess prejudice. We restrict our evidentiary overview accordingly.

The victim was born in 1990; the trial took place in August 2008. Her parents divorced when she was six or seven years old, at which time she and her mother moved in with defendant. He molested her from the beginning, touching and kissing her in various inappropriate places and having her masturbate him. Eventually, he progressed to forcing her to participate in sexual intercourse seven or eight times in the summer after eighth grade.

Defendant forced the victim to masturbate him in front of one of her friends on one occasion. The friend, C.D., corroborated her account. C.D. continued to participate in the same social circle as defendant, but took steps to avoid defendant having any contact with her young daughter.

Defendant played a pornographic movie for the victim and a second of her friends, V.V. (who was about three years older than the victim). He asked V.V. if she would fellate him; she declined. V.V. corroborated the account as occurring when she was between 14 and 15, adding that defendant had served them

alcohol and displayed dildos, and offered to buy V.V. one if she would use it in front of defendant.

The victim's stepcousin (born in 1988) testified that when she was 16 or 17 defendant gave them wine, played pornography on the television, and kissed the victim in an inappropriate way. On another occasion, he grabbed the stepcousin's buttocks and said, "Nice butt."

To avoid defendant, at the start of ninth grade in 2004, the victim began living with a friend, then the stepcousin, then her paternal aunt, and then her father. The victim had not reported defendant's behavior to her mother before moving out. The victim did not tell the friend with whom she stayed during the summer and fall of 2004 (Samantha M., the subject of the acquitted count) about the molestations at that time. The victim did tell her later, and Samantha M. was also present in a van at a baseball field when the victim tried to tell her mother about defendant's molestations; the mother got very mad at the victim for telling her something she did not want to believe. When the victim came to live with her, the stepcousin was aware defendant's behavior was the basis. She did not learn that he had actually molested the victim until some point after the cousin's 2006 wedding (to which she had invited defendant).

In 2006, when the victim's mother and defendant were moving to a new home, the victim said she would not be joining them because of defendant's past molestations of her. Her mother vacillated in her belief in the victim's claim. However, she

took the victim to a mental health center, where the victim admitted being molested even though she knew this would add to the troubles she was having in her relationship with her mother.[1] This led to an interview with Child Protective Services. Since the interview, she has been living with a maternal aunt.

The victim's father testified for the defense. The victim was angry and rebellious while she stayed with him, breaking things around the house, forcing him to call the police at least a dozen times. In 2007 and 2008, she threatened that if he did not mind his own business she would lie and get him in trouble like she did with defendant.[2] He did not think she was always truthful, and as a child she had vowed to get even with defendant one way or another at the time of the divorce.

The victim's paternal aunt testified that she and the victim had a strained relationship when living together. She did not think the victim was truthful. She was present when the victim made the threat in 2007 to make a false report that her father had molested her, because he would not give her money. Having watched her grow up, the aunt described the victim as "a bad seed from the start."

Defendant testified in his own behalf, denying the accounts of the prosecution witnesses. He began to have trouble with the victim's rebellious behavior when she was in the sixth grade.

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[1] Her mother died in the fall of 2007.

[2] The victim denied making this threat.

She moved out of his home because he was objecting to the people with whom she associated (among them the older second friend).

DISCUSSION

I. Exclusion of Potential Impeachment Evidence

A.

Before trial, the prosecutor moved to exclude any reference to an incident between the victim and her paternal aunt that occurred two months earlier. He contended it was irrelevant.

In the police report appended to the motion, the aunt said the victim was a passenger in a car that had driven up to where the aunt was standing. The victim got out and started yelling at the aunt, "So you want to talk shit. I am going to kick your ass." When the aunt attempted to walk away, the victim punched her three times, one of which resulted in a split lip. The aunt asked the responding officer to arrest the victim, asserting the attack was in retaliation for her testimony for the defense in the mistrial. The officer took the victim into custody. The victim claimed that the aunt had called her a loser as she drove by. She did not say anything about her aunt's testimony. The officer released the victim and forwarded the matter to the juvenile probation department for prosecution. Another officer spoke with the driver of the car (the victim's maternal aunt), who claimed that the paternal aunt had made obscene gestures at the victim as they drove by.

At the hearing, the trial court stated that it had reviewed the police report and concluded (without entertaining any

argument) that "the battery is not a crime of moral turpitude. So my ruling is that this incident . . . [is] not relevant, and also under Evidence Code section 352, I'm excluding it."

In his amended motion in limine, defendant requested the admission of any crimes of moral turpitude that any of the prosecution witnesses had committed. At the hearing, the prosecutor identified the victim's 2005 arrest for petty theft "that was referred to probation. So even if it . . . ended up in adjudication, it wouldn't be a conviction. . . . It's basically two girls at Mervyn's," which happened when the victim was 15. Without entertaining further argument, the court excluded reference to the incident: "Pursuant to Evidence Code section 352, I find that it's unduly prejudicial and not probative. It's not a conviction. It's remote in time."

B.

Defendant asserts that the court's exclusion of these two incidents violated his constitutional rights regardless of the merits of its rulings. On the merits, with respect to the attack on the paternal aunt, he concedes simple battery was not a crime of moral turpitude relevant to the victim's credibility (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522 & fn. 9), but asserts that it reflects a consciousness of guilt because it was an attempt to intimidate an adverse witness.[3] As for the petty

[3] Defendant makes reference in passing to the failure of the trial court to hold a foundational hearing (Evid. Code, § 402) "to evaluate the issue rather than summarily rejecting the evidence." This nascent argument, if meant as an independent

theft, he notes misdemeanor *conduct* that reflects moral turpitude (such as underlies petty theft) is admissible for purposes of credibility (*People v. Wheeler* (1992) 4 Cal.4th 284, 295 & 297, fn. 7) and the offense was not remote.

Trial counsel did not assert witness intimidation as a basis for admitting evidence of the attack on the aunt, nor did she point out that misdemeanor conduct could be admissible for purposes of impeachment. While this arguably forfeits these issues on appeal (Evid. Code, § 354), the peremptory manner in which the trial court ruled on the issues could have forestalled defense counsel from further argument; therefore, this did not provide a meaningful opportunity to object. (Cf. *People v. Scott* (1994) 9 Cal.4th 331, 353-354, 356.) We will therefore address the merits of defendant's claims, and do not need to consider his claim that any forfeiture was the result of ineffective assistance of trial counsel.

Nonarbitrary application of the ordinary rules of evidence does not violate a defendant's constitutional rights absent some substantial impairment of a central feature of the defense case. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428 [due process; presenting defense; confrontation]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1050-1051 [cross-examination]; cf. *Crane v.*

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ground for reversal, does not merit our plenary consideration. (*Imagistics Internat., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 591, fn. 8.) In any event, a trial court is not obligated to hold a foundational hearing sua sponte. (See *People v. Williams* (1997) 16 Cal.4th 153, 196.)

Kentucky (1986) 476 U.S. 683, 690-691 [90 L.Ed.2d 636, 645] [lack of rational basis for excluding pivotal evidence].) Defendant fails to establish that the exclusion of cumulative impeachment evidence rises to the level of a constitutional violation, and we therefore reject this aspect of his argument.

The trial court's alternative ground for excluding evidence of the attack on the paternal aunt was Evidence Code section 352 (section 352). Although not expressly articulated, it would seem the trial court was not asserting that the prejudicial value exceeded the probative value, but that it would consume an undue amount of court time to present the circumstances fully. It would have required the testimony of a total of five witnesses (the aunt and her two companions, and the victim and her driver) to allow the jury to determine whether the aunt in fact triggered the attack with a taunting gesture or remark as the victim and her driver asserted (a matter that the other three elided from their statements to the police), in which case the incident would not have any probative value and this would simply have been a significant waste of time. Even if the jury were to resolve this dispute in favor of an unprovoked attack, it would then need to determine whether it was simply in retaliation for past testimony that the victim considered to be false, or was intended to dissuade future truthful testimony. This would significantly distract the jury's attention on a collateral issue. We therefore do not find any abuse of discretion on the part of the court in excluding this evidence.

As for the petty theft arrest, it is hard to discern why the trial court did not believe it was probative. A shoplifting arrest can reflect moral turpitude (*In re Honoroff* (1975) 15 Cal.3d 755, 758), which means it is relevant to the victim's veracity. This common juvenile offense would not seem likely to provoke an undue amount of prejudice (i.e., an emotional bias that is extraneous to the evidence and issues at trial, which leads to a visceral result intended to punish rather than from a rational evaluation of the facts (*People v. Doolin* (2009) 45 Cal.4th 390, 439)). Nor, for that matter, has three years ever been considered "remote" for purposes of impeachment (cf. *People v. Morris* (1991) 53 Cal.3d 152, 195 [seven to nine years not too remote], disapproved on different grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1), and the incident was even more proximate to the victim's initial report of the molestations. However, even though the court did not expressly articulate undue consumption of time as a basis for its ruling, we can uphold its ruling under that branch of section 352. (*People v. Geier* (2007) 41 Cal.4th 555, 582 [review ruling, not court's reasoning, and may apply section 352 even if trial court did not].) It would not, as defendant suggests, be simply a matter of asking the victim whether she was arrested. In order to evaluate the probative value of the arrest in assessing the victim's credibility, the jury would need to hear all of the circumstances leading up to the arrest (including whether she played a leading or passive role), and possibly the manner in which the juvenile court treated the seriousness of the offense

(as an objective indicium of the degree to which it should reflect on the victim's character). This likely would have required additional witnesses. It would not have been an abuse of discretion to exclude the evidence on this basis, given its minimal incremental value in assessing the credibility of the victim where her own parents and paternal aunt did not find her believable. The court's ruling is therefore not a ground for reversal.

II. Disclosure of Juror Information and Alleged Juror Misconduct

A.

Defendant filed concomitant motions for a new trial based on juror misconduct, disclosure of juror identification data, and fees to investigate juror misconduct. Trial counsel filed declarations in support of the first two.

Trial counsel attested that she and defendant went to a local restaurant after a day of jury selection. When they were seated at the bar, defendant pointed out that a potential juror was sitting nearby. They quickly finished their drinks and departed; they did not have any interaction with the potential juror other than to assure him that he could remain because they were leaving. The potential juror eventually became a juror and was selected the jury foreman.

Defense counsel returned to the restaurant after the jury had reached its verdicts. A bartender told defense counsel that the jury foreman (whom the bartender knew well) had been discussing the case at the bar on the earlier occasion both

before and after defense counsel and defendant had been present. The foreman had been talking with a patron named "Cisco." Cisco also happened to be present during defense counsel's return visit to the restaurant. Cisco told defense counsel he had mentioned to the foreman that he knew defendant. The foreman then offered to vote in favor of defendant if Cisco could provide him with some controlled substances. Cisco told the foreman he did not use any, and the foreman "backed off." Another employee, who apparently spoke with defense counsel as well, heard the foreman talking about the case on the earlier occasion when she came in to pick up her check.

Neither defendant nor his family had sufficient funds to pay for an investigator to look into these assertions about the jury foreman. Trial counsel had been representing defendant on retrial on a pro bono basis and could not afford to incur any additional costs.

In her declaration in support of the request for jury identification data, defense counsel asserted the evidence in the motion for new trial constituted good cause. She admitted "I believe the court can rule on the Motion for New Trial without actually taking evidence from the members of the jury, [but] I believe . . . at this point it would be malpractice should I not at least interview [the members of the jury] as well."[4]

[4] She reiterated this vague need for the information at the hearing on the motion for new trial ("had we been able to

In opposition, the prosecutor offered the declaration of the jury foreman. The foreman had observed defense counsel and defendant come into the restaurant, where the foreman was seated alone at the bar. When they saw him sitting at the bar, they went to sit at a table. A man sat down next to the foreman. Defendant approached the bar to order drinks, and spoke with the man while he waited. A woman later approached the man and had a conversation that seemed to involve the mention of methamphetamine; she appeared to be under its influence. The foreman commented to them that he had tried it once for weight loss, but it was not worth it. The man later began to extol defendant's virtues and offer his belief that the victim was a liar. The foreman decided to leave the bar. The foreman never asked if the man could obtain methamphetamine, and never offered to vote in defendant's favor because he had yet to be accepted as a juror. Although he heard the man talk about the case, the foreman did not talk about it at any time himself. The foreman identified the man as Mike Sisco from photographs that the prosecutor provided to him. The jury's deliberations were restricted to the evidence at trial and "there was no impropriety in the jury room whatsoever."

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interview all of the jurors, we would *maybe perhaps* have more information" (italics added), speculating that the incident in the restaurant became part of the deliberations.

The court denied the motion to disclose the identification data of the jurors. It set the hearing on the motion for new trial for the end of the week.

At the hearing, the bartender testified that Michael Sisco had arrived about the same time as the jury foreman, and they had been discussing the case. Defendant and defense counsel came in and initially sat next to the jury foreman at the bar. When they noticed who he was, they removed themselves to a table. The foreman told the bartender at that point that he was in fact involved in defendant's trial. The bartender could not be certain whether there was any talk about controlled substances. The bartender admitted that she had known defendant for "pretty much all [her] life," but that did not mean she was willing to lie for him. The bartender noted that Mike Sisco was a 13-year acquaintance and the sperm donor for her niece. In her testimony, defense counsel did not add anything material to her declaration. Defense counsel was not able to obtain Mike Sisco's presence at the hearing, and the other restaurant employee who had spoken with defense counsel--who happened to be the sister of the bartender--also did not appear at the hearing, even though the bartender had asked her to come.

In ruling on the motion, the court asserted that it saw "a lot about nothing. We have some bartender who is a friend of [defendant], and then we have this vanishing witness. The only witness that [defense counsel] needed to interview was the witness, who's a friend of her client, who vanished, if that

individual[’s] testimony would have been worth anything anyway, and I don’t think it would have been, I’m rejecting it entirely. I have no reason to disagree with the declaration of the jury foreman. . . . I don’t find there is a need to go interview the rest of the jurors. The declaration of the jury foreman cleared all of this up quite clearly. I see what is going on, and I believe that it’s an attempt to manufacture evidence on the part of [defendant] and his friends, and I don’t buy it.” The court asserted its belief that releasing the juror identification data would only increase the harassment of the jurors that had been reported to the court already.

B.

Defendant asserts that his motion presented a “compelling” showing of good cause for disclosure of the jury identification data to investigate a reasonable belief in misconduct on the part of the foreman, which was necessary to provide the court with adequate information to rule on a motion for new trial based on juror misconduct that was not available through less intrusive means. (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552; Code Civ. Proc., §§ 206, subd. (g), 237, subd. (b).) Focusing only on the evidence that the trial court found credible, defendant asserts the misconduct consisted of the jury foreman’s failure to notify the court about the effort to influence his opinion of defendant.[5] Defendant also speculates

[5] We do not agree that the jury foreman’s casual conversation with Mike Sisco, in which he mentioned he was a potential juror in defendant’s trial, amounted to any form of misconduct.

once again that the foreman may have told the other jurors about this, which entitled defendant to question them. Finally, defendant suggests the trial court gave his motion short shrift because it was already impatient with defense counsel's handling of the case.

In his declaration, the jury foreman denied that any impropriety took place over the course of the jury's deliberations, which would include a discussion of the extrajudicial Sisco incident. Defendant did not produce any *evidence* to the contrary. This is manifestly insufficient to entitle him to identification data of the other jurors (*People v. Granish* (1996) 41 Cal.App.4th 1117, 1131-1132), particularly when weighed against the harassment of some jurors that apparently had been taking place. Consequently, the trial court properly denied the motion to disclose as to them.

As for getting access to the data of the jury foreman himself, defendant failed to demonstrate the less intrusive use of the foreman's declaration was insufficient for purposes of the trial court's consideration of the claim of juror misconduct in his motion for new trial. Defense counsel's direct questioning of the foreman could not have added anything to the claim that the foreman's failure to disclose the contact was misconduct. The foreman, for example, could not competently describe the effect of the Sisco contact on his reasoning. (Evid. Code, § 1150, subd. (a).) Defendant therefore failed to establish good cause for the foreman's data, and the court

properly denied access to it for purposes of developing his motion for new trial.[6]

As for defendant's claim of judicial bias against trial counsel, expressions of impatience or irritation are not improper where it appears to a court that an attorney is engaged in dilatory behavior. (See *People v. Snow* (2003) 30 Cal.4th 43, 78-79.) Whatever the degree to which trial counsel may have provoked the trial court, its ruling was nonetheless well within the bounds of discretion; indeed, we do not believe any other court would have ruled any differently. As a result, this is not a basis for reversal.

This leaves defendant's argument that he was entitled to funds to pay for an investigation of juror misconduct. As he concedes, this issue becomes moot if the trial court correctly denied him access to the identification data. Having found the trial court's ruling on access was correct, we do not need to address the funds issue further.

III. Penal Code Section 4019 Credits

Pursuant to this court's miscellaneous order number 2010-002, filed March 16, 2010, we have deemed defendant to have raised an issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him

[6] As defendant does not present any argument regarding the denial of the motion for new trial itself, we do not consider it.

to additional presentence conduct credits. In our recent opinion of *People v. Brown* (2010) 182 Cal.App.4th 1354, we concluded that the amendments apply to pending appeals. As defendant is subject to registration as a sex offender (Pen. Code, § 290) and his present conviction is a violent felony (*id.*, §§ 288.5, 667.5, subd. (c)(16)), he is only entitled to accrue work and conduct credits at the previous rate of two days for every six days served (*id.*, § 4019, subds. (b)(2) & (c)(2)) with a period of six days being deemed served for every four-day period of actual custody (*id.*, § 4019, subd. (f)).

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

SCOTLAND, P. J.

HULL, J.